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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/664,450	09/20/2003	Yurdaer Nezihi Doganata	CHA920030010US1	4523
7590 James R. Murray 207 Dogwood Court Poughkeepsie, NY 12601		EXAMINER DWIVEDI, MAHESH H		
		ART UNIT 2168		
		PAPER NUMBER		
		MAIL DATE 05/07/2009		
		DELIVERY MODE PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/664,450

Applicant(s)

DOGANATA ET AL.

Examiner

MAHESH H. DWIVEDI

Art Unit

2168

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 27 April 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on 27 April 2009. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-4-9 and 12-20.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Tim T. Vo/
Supervisory Patent Examiner, Art Unit 2168

/Mahesh H Dwivedi/
Examiner, Art Unit 2168

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's request for reconsideration filed on 4/27/09 is acknowledged, but is not persuasive. Applicants argue on page 11 that "The reason why an affidavit did not accompany the timely submission of the corrected copy of the "d blue" article is that the applicant's attorney did not think it was necessary to submit an affidavit under 37 CFR 1.132 with the corrected copy of the "d blue" article. Section 1.132 provides for introduction of evidence "on a basis not otherwise provided for must be by way of an oath or declaration under this section". The corrected copy of the article speaks for itself as to the issue of the correct date of its publication. Applicant's attorney does not see how an affidavit of the inventor Dr. Moon Kim is required for further verification of an article in the independent publisher's website". However, applicant's submitted evidence on the record of a statement from the inventor Dr. Moon Kim in appendix A of the remarks filed on 8/8/08. Because such remarks failed to satisfy the requirements of MPEP 715.04 ("An affidavit is a statement in writing made under oath before a notary public, magistrate, or officer authorized to administer oaths. See MPEP § 604 through § 604.06 for additional information regarding formal requirements of affidavits. 37 CFR 1.68 permits a declaration to be used instead of an affidavit. The declaration must include an acknowledgment by the declarant that willful false statements and the like are punishable by fine or imprisonment, or both (18 U.S.C. 1001) and may jeopardize the validity of the application or any patent issuing thereon. The declarant must set forth in the body of the declaration that all statements made of the declarant's own knowledge are true and that all statements made on information and belief are believed to be true"), the attempt by the applicant to disqualify Doganata was not persuasive. Simply put, the remarks of the inventor dictated that they be submitted in a declaration/oath. In addition, because the 132 declaration filed on 01/08/09 did not meet the timeliness requirement under MPEP 716.01 [R-3] ("Evidence traversing rejections must be timely or seasonably filed to be entered and entitled to consideration. In re Rothermel, 276 F.2d 393, 125 USPQ 328 (CCPA 1960). Affidavits and declarations submitted under 37 CFR 1.132 and other evidence traversing rejections are considered timely if submitted: (1) prior to a final rejection, (2) before appeal in an application not having a final rejection, (3) after final rejection "*", but before or on the same date of filing an appeal, upon a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented in compliance with 37 CFR 1.116(e); or (4) after the prosecution is closed (e.g., after a final rejection, after appeal, or after allowance) if applicant files the affidavit or other evidence with a request for continued examination (RCE) under 37 CFR 1.114 in a utility or plant application filed on or after June 8, 1995; or a continued prosecution application (CPA) under 37 CFR 1.53(d) in a design application"), the 132 declaration was not considered as there was no explanation as to why the 132 affidavit was not filed before the final rejection as required under the cited MPEP. The MPEP is very clear that that examiners only consider declarations when timely submitted (See MPEP 716.01(a) [R-2] "Objective Evidence Must be considered WHEN TIMELY PRESENT". The 132 declaration failed to meet the timeliness requirements, and thus, after file submission of such a declaration would require a new search and/or consideration.